IN THE MISSOURI SUPREME COURT

No. SC85594

STATE OF MISSOURI,

Respondent,

vs.

CHRISTY L. JACO,

Appellant.

Appeal from the Circuit Court of Ste. Genevieve, Mo.
Twenty-fourth Judicial Circuit
The Honorable Kenneth W. Pratte, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for the class A felony of abuse of a child § 568.060, RSMo 2000, obtained in the St. Genevieve County Circuit Court and for which appellant was sentenced to twenty years in the custody of the Department of Corrections. The appeal involves a category reserved for the exclusive appellate jurisdiction of this Court because it involves an attack on the constitutionality of a statute. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Christy Jaco, was charged by indictment in the St. Francois County Circuit Court with abuse of a child by causing the death of thirteen-month-old Zachary Brooks by shaking him (L.F. 23). Appellant filed a motion for a change of venue (Tr. 28). That motion was granted and the case was transferred to St. Genevieve County (L.F. 02, 57). On July 28, 2003, the cause went to trial before a jury, the Honorable Kenneth W. Pratte presiding (Tr. 1).

Guilt phase

The sufficiency of the evidence to support appellant's conviction is not in dispute. Viewed in the light most favorable to the verdict, the following evidence was adduced: The victim, Zachary Brooks, was born on October 1, 2000, to appellant and Jeremy Brooks (Tr. 325, 622, 769). Starting shorting after Zachary was born, friends and acquaintances of appellant began noticing that Zachary suffered from numerous bruises (Tr. 468, 499-500, 511-512, 537, 544-545). Those injuries continued after appellant and Zachary stopped living with Jeremy Brooks, in July of 2001, and moved in with her new boyfriend, Matthew Eckhoff, and his two children in Apartment 1 at 717 Jackson, in Park Hills, Missouri (Tr. 329, 512, 524, 527-528, 538, 552, 578-582, 591-593, 620-625, 669, 695, 710, 720, 733-736).

When individuals confronted appellant about these numerous bruises, she offered explanations such as that Zachary fell down, or that he inflicted the bruises on himself by banging his head on a crib or by hitting himself with toys, or that Zachary had a blood disease that caused him to bruise easily (Tr. 332-333, 472-473, 554, 622). However, at this point in time she had not seen a doctor about Zachary allegedly having a blood disease (Tr. 604-611).

These excuses were also thrown into doubt by the observations of people who saw appellant slap and violently shake Zachary when she became upset with him (Tr. 333, 335, 502-503, 512, 514).

On November 7, 2001, Zachary started attending day care with Tammy Benson and she started noticing that he had bruising and other injuries (Tr. 577-578). When she found striped bruises across Zachary's buttocks and more bruises and scrapes on his back, on November 15, 2001, she photographed those injuries and told one of Zachary's grandmothers, Margaret Politte, to have Zachary checked by a doctor, or she would to report the injuries (Tr. 581-582).

On November 16, 2001, appellant brought Zachary to a doctor in order to see if he had a disorder that caused him to bruise easily (Tr. 590). Dr. Daniel Rudolf saw Zachary and observed that he had multiple aged bruises on his back, shins, and face (Tr. 591). Appellant told Dr. Rudolf that Zachary bruised easily when he fell and had shots, and said that he bled easily (Tr. 591). Appellant said that she did not have any concerns about somebody abusing her child (Tr. 592-593). A test performed that day showed that Zachary stopped bleeding in a normal amount of time (Tr. 596-597). Dr. Rudolf referred Zachary to a specialist at Cardinal Glennon Hospital, and an appointment was scheduled for November 27, 2001, but the victim was dead before that appointment occurred (Tr. 175, 183, 598, 654).

The acts that led to the victim's death occurred on November 21, 2001. On that day, appellant became angry because her boyfriend, who was separated from his wife, was served with divorce papers (Tr. 326, 342, 476-477, 558). This upset her because Matthew Eckhoff's wife, Angela Eckhoff, wanted full custody of her children, Devon and Noah Eckhoff, and she

thought that this would mean that Angela Eckhoff would be "tapping into" her money (Tr. 342, 477, 558).

After 9:50 p.m., Matthew Eckhoff went into the kitchen of his apartment and began cleaning it (Tr. 345). While he was doing that, appellant was getting ready for work and Zachary, who was on the couch and had been suffering from bronchitis, became fussy and started crying (Tr. 266, 281, 345, 352). Matthew Eckhoff looked into the living room area and saw appellant lift up Zachary by placing her hands under his arm pits (Tr. 346). Appellant then violently shook Zachary so that his head whipped back and forth about five or six times (Tr. 346). Zachary stopped crying (Tr. 347).

Appellant then took Zachary to the bedroom (Tr. 347). Matthew Eckhoff heard "three pounds against the wall" in the bedroom (Tr. 347). Appellant then came out of Zachary's bedroom, closed the door almost completely, and said that Zachary was finally asleep (Tr. 348). Matthew Eckhoff did not hear any sounds coming from Zachary's room (Tr. 348).

At about 10:15 or 10:20 p.m., appellant left to go work at her job at a retirement home (Tr. 348, 758-759). Matthew Eckhoff, who thought that Zachary was sleeping, laid down on the couch and began reading (Tr. 348-349).

Between about 11:30 p.m. and 12:30 a.m., Matthew Eckhoff heard Zachary coughing and got up to check on him (Tr. 349-350). He saw that Zachary's body was tense, his head was arched back, his eyes were open, and he was not breathing (Tr. 350). He picked up Zachary, put him over his shoulder, and patted him on the back (Tr. 350). Zachary started coughing and spit up, but did not start breathing (Tr. 350-351). Matthew Eckhoff put Zachary down and gave him

mouth-to-mouth resuscitation (Tr. 351). Zachary coughed and started breathing (Tr. 352). Matthew Eckhoff, who thought that this had something to do with Zachary's bronchitis, called appellant and then 911 (Tr. 351-353).

An ambulance came and took Zachary to Parkland Hospital in Farmington (Tr. 354-355). Zachary was then transferred to Cardinal Glennon Children's Hospital in St. Louis (Tr. 173-175). When he arrived there, he was in a coma (Tr. 175). A CAT scan showed that Zachary's brain was extremely swollen, so that it had lost its normal contours, and that it was bleeding (Tr. 177-179). The brain injuries consisted of diffuse axonal injury, a subdural hemorrhage, and a subarchachnoid hemorrhage (Tr. 217-218). These were consistent with Zachary being severely shaken (Tr. 179, 217). Zachary suffered from severe retinal hemorrhages through all of the layers of the retinas in both eyes (Tr. 217). This was also consistent with Zachary being severely shaken (Tr. 217). Other injuries to Zachary included: blood in the back of the neck which was consistent with a whiplash injury; two large bruises to his scalp; a bruise to his left cheek; marks, scrapes, and abrasions to the back of his head; a brown bruise under his left eye; a bruise to his left jaw; two parallel red lines on the back of his head; a red abrasion to his scalp; a mark with a circular pattern of little dots around the outside of it on his forehead; bruises on his thighs; an old injury to his penis; a fractured left clavicle (collar bone) that had been healing for between a week and a month and was consistent with an injury from a severe shaking; a fractured right tibia (shin bone) that had been healing for two weeks to two months and was consistent with an injury from Zachary's ankle being twisted; and a red mark on the palm of his left hand (Tr. 204-220). On November 23, 2001,

Zachary was declared to be legally dead (Tr. 240-241, 250). He died from a closed head injury (Tr. 218).

The day before Zachary died, Officer Mark Kennedy, of the St. Louis Metropolitan Police Department, had received information that indicated that Zachary's injuries were consistent with him being shaken (Tr. 262-263). When appellant had been observed at the hospital, she had not cried or displayed any emotion (Tr. 242, 256, 259, 269, 505, 562). When Officer Kennedy spoke to appellant, she explained Zachary's bruises by saying that he bruised very easily (Tr. 769). She said that Matthew Eckhoff did not abuse Zachary (Tr. 268).

Officer Douglas Bowles, of the Park Hills Police Department, spoke to numerous people about the case (Tr. 275-276, 282-284). He then received a warrant for appellant's arrest, and she was arrested by the St. Louis Police Department (Tr. 285). He met with her at the St. Louis Police station (Tr. 286).

Officer Bowles informed appellant of her Miranda rights, and appellant indicated that she understood those rights and wanted to speak to him (Tr. 286-287). During the interview, Officer Bowles said that he understood that appellant had trouble controlling her temper (Tr. 288). Appellant said that she could control her temper, or she would come across the table and gouge his eyes out (Tr. 288).

While appellant was being transported to the St. Francis County Jail, on November 23, 2001, she volunteered that she knew that something like this would happen, but that she was praying that it would not (Tr. 320-321).

Appellant did not testify on her own behalf. She presented the testimony of members

of her family and friends who testified as to seeing bruising on Zachary after appellant moved in with Matthew Eckhoff (Tr. 669-670, 678, 695, 709-710, 719-720, 733-736).

At the close of the evidence, instructions, and argument of counsel, the jury found that appellant was guilty as charged (L.F. 11).

Penalty phase

In the penalty phase, the State presented evidence through the testimony of four witnesses showing: that appellant had a tendency to leave the care of Zachary to others; that she gave deficient care to Zachary; that Zachary was well-loved and would be missed; that when appellant was told that Zachary would be retarded if he survived, she said that she would "like to pull the plug"; and that she once hit two-year-old Noah Eckhoff in the face with such force that she stunned him and left a print on the side of his face (Tr. 896-934).

Appellant presented evidence that she had been sexually and physically abused by her parents when she was a child, and that she had been physically abused at a foster home (Tr. 946-975). She also presented evidence that she cares for people, did volunteer work in the past, that she loved Zachary, and that the couple who adopted her loved her (Tr. 978-979, 982-993).

After the close of the penalty-phase evidence, instructions, argument of counsel, and jury deliberations, the jury announced that it was unable to agree on a punishment (L.F. 12). The trial court set a sentencing hearing for September 16, 2003 (L.F. 12). On that date, the trial court sentenced appellant to twenty years in the custody of the Department of Corrections (L.F. 1017).

ARGUMENT

I.

The trial court did not abuse its discretion in the guilt phase and appellant was not prejudiced by the trial court's actions when it excluded Defense Exhibit J, a photograph of the crime scene that was taken a year and a half after the crime and after the furniture in the apartment had been changed, because that photograph was misleading, confusing, and appellant was able to use other photographs that were taken near the time of the crime that were not confusing or misleading.

Appellant alleges that the trial court erred in the guilt phase by refusing to admit into evidence Defendant's Exhibit J, which was allegedly the only photograph tendered by the parties demonstrating Matthew Eckhoff's vantage point, because the changes in the apartment between the time of the crime and the time the photograph was taken did not render the photograph too confusing or misleading (App.Br. 36).

A. Relevant facts

The record shows that prior to the trial, the State provided appellant with photographs of the crime scene that showed that a person in the kitchen of that residence could see what was occurring on and by the couch in the living room (L.F. 38, 41).

During appellant's trial, Officer Guy Bowles testified for the State that on November 22, 2001, which was the day after the victim's injuries were inflicted, he took photographs of the crime scene (Tr. 276-277). Those photographs were State's Exhibits 17-21, which were admitted into evidence (Tr. 278). State's Exhibit 17 showed the living room, including the

couch in that room, and the kitchen and how they were related together (State's Exhibit 17; Respondent's appendix at A1; Tr. 217). State's Exhibit 18 is a photograph from the kitchen that shows part of the living room (State's Exhibit 18; Respondent's appendix at A1). State's Exhibit 19 is a photograph that was taken from near the couch in the living room and shows the other side of the living room and the kitchen (State's Exhibit 19; Respondent's appendix at A2). State's Exhibit 20 is a photograph taken from the area near the couch in the living room into the kitchen and Zachary's bedroom (State's Exhibit 20; Respondent's appendix at A-2; Tr. 280). State's Exhibit 21 is a photograph from the kitchen looking into the living room, showing the front door, a chair, the coffee table in front of the couch, and a window (State's Exhibit 21; Respondent's appendix at A3; Tr. 280).

State's witness Matthew Eckhoff testified on direct examination that he went into the kitchen of his apartment on November 21, 2001, and began cleaning it (Tr. 345). While he was doing that, appellant was getting ready for work and Zachary, who was on the couch and had been suffering from bronchitis, became fussy and started crying (Tr. 266, 281, 345, 352). Matthew Eckhoff looked into the living room area and saw appellant lift up Zachary by placing her hands under his arm pits (Tr. 346). Appellant then violently shook Zachary so that his head whipped back and forth about five or six times, and Zachary stopped crying (Tr. 346-347).

During cross-examination, Eckhoff testified that he was leaning up against the kitchen counter, and he looked into the living room area to see Zachory (Tr. 387). Appellant's counsel used State's Exhibit 17 to cross-examine Eckhoff and to clarify his testimony (Tr. 388-389). Eckhoff said that appellant stood between the couch and the coffee table (Tr. 402). During

recross-examination, appellant's counsel used State's Exhibit 19, described above, and Defendant's Exhibit H, which is copies of State's Exhibits 19 and 20, to show how the apartment was laid-out (Tr. 463-464). Appellant did ***not*** use Eckhoff to lay a foundation for Defense Exhibit J, which is the subject of this point, and he did not attempt to use that exhibit to cross-examine Eckhoff. Thus, appellant never established through the testimony of Eckhoff that Defense Exhibit J portrayed Eckhoff's vantage point.

Defense Exhibit J was offered into evidence during the testimony of appellant's father, Melvin Jaco (Tr. 672, 688-692). It appears to have been taken from the middle of the living room (Appellant's appendix at A1). In a conference out of the hearing of the jury, appellant's counsel indicated that Defense Exhibit J depicted conditions that were different than those that exited at the time of the offense because the furniture in the apartment had been changed by a different tenant, but that the walls of the apartment had not changed (Tr. 688). The prosecutor objected to the photograph, which was taken a year and a half after the offense, on the ground that it was not an accurate representation of the apartment at the time of the offense and the different furniture made the photograph confusing (Tr. 688-690). The trial court stated that the different furnishings in the photograph threw everything "out of kilter" so that the photograph was misleading (Tr. 690). It found that the photograph was inadmissible (Tr. 691).

Appellant's counsel made an offer of proof. He said that he wanted to lay the foundation for Defense Exhibit J with Melvin Jaco (Tr. 691). He said that Melvin Jaco could testify that the floor plan is the same as it was on November 21, 2001g18

, but that the furnishings were different (Tr. 691-692).

In appellant's closing argument, her counsel used the photographs that were admitted into evidence to make the argument that she claims that Defense Exhibit J supported. Her counsel argued:

> These pictures are taken from in front of the couch, in front of the table. Do you see that blue box? That's the same blue box you see here. She was behind that box. There is absolutely no way that he could see where she was from the angle in which he was.

(Tr. 853).

B. Standard of review

The trial court has broad discretion in determining whether to admit photographs into evidence. State v. Davis, 107 S.W.3d 410, 422 (Mo.App., W.D. 2003). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the actions taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Brown, 939 S.W.2d 882, 883 (Mo.banc 1997).

C. Analysis

The trial court did not abuse its discretion when it excluded Defense Exhibit J because that exhibit would not have aided the jury in that it was confusing and misleading, and appellant was able to use other exhibits that were not confusing and misleading.

Defendant's Exhibit J was confusing and misleading because it appears to have been

taken from the middle of the living room and it is difficult to determine from the photograph where appellant was standing when she committed the crime in that the furniture that was used by Eckhoff to describe where appellant was standing is not shown in Defense Exhibit J, and appellant did not question Eckhoff about the photograph to get him to establish where appellant was standing in the photograph in relation to the new furniture that was there. It was well within the discretion of the trial court to exclude a photograph that may cause more confusion or prejudice than aid to the jury.

For example, in State v. Wright, 632 S.W.2d 296, 299 (Mo.App., E.D. 1982), the Court of Appeals held that a trial court did not abuse its discretion by excluding a photograph that pertained to the ability of the victim to identify the defendant and showed the defendant posed in the position that he allegedly was in when he was encountered by the victim because the prejudicial effect of the photograph outweighed its beneficial effect. Similarly in State v. Craig, 406 S.W.2d 618, 623-624 (Mo.1966), this Court found that a trial court did not abuse its discretion by excluding a photograph that the defendant wanted admitted for the purpose of showing that a witness to a burglary of a store had an automobile between her and the store and could not see how many persons were involved in the burglary because the photograph was taken during daylight, while the crime occurred at night, and the witness made her observations through a window, while the photograph was taken from her porch. No Missouri case has found that an abuse of discretion and prejudice occurred from a trial court excluding a photograph that was confusing and misleading.

Appellant also failed to show that the Defense Exhibit J had any relevance because she

did not make an offer of proof showing that it portrayed Eckhoff's line-of-sight. See State v. Huckaby, 824 S.W.2d 155, 157 (Mo.App., S.D. 1992)(trial court properly excluded photographs because no offer of proof was made showing that they were relevant and admissible). As was discussed above, appellant did not seek to make an offer of proof as to this matter with Eckhoff, instead, she tried to make it with Melvin Jaco, who she alleged simply would have said that the floor plan is the same in Defense Exhibit J as it was on November 21, 2001, but that the furnishings were different (Tr. 691-692). Nor does it appear from the photograph that it was taken from within the kitchen, where Eckhoff testified that he was standing (Tr. 345). Rather, it appears that the photograph was taken from the middle of the living room (Appellant's appendix at A1). See State v. Craig, supra at 623-624 (photograph taken from wrong vantage point).

The trial court also did not abuse its discretion and appellant could not have been prejudiced by the trial court's actions because appellant's trial counsel was able to use other exhibits that were not confusing and misleading. State's Exhibits 17-21 and Defense Exhibit H adequately allowed appellant to show the jury how the apartment looked and how the living room could be seen from the kitchen (State's Exhibit 17-21; Tr. 217, 278, 280, 388-389, 463-464; Appellant's appendix at A2-A3). See State v. Uka, 25 S.W.3d 624, 627 (Mo.App., E.D. 2000)(trial court did not abuse its discretion or prejudice the defendant when it excluded photographs that were offered for the purpose of impeaching the testimony of the victim because they were cumulative to other impeaching testimony that was presented). This fact is amply demonstrated by the closing argument of appellant's trial counsel in which he used

the photographs that were admitted into evidence to discuss whether Eckhoff could have seen appellant shake Zachary (Tr. 853).

In light of the above, respondent submits that the trial court did not abuse its discretion when it refused to admit Defense Exhibit J, and appellant could not have been prejudiced by the trial court's actions. Thus, appellant's first point on appeal must fail.

II.

The trial court did not abuse its discretion in the guilt phasewhen it refused to allow appellant's counsel to cross-examine Dr. Martin Keller and Dr. Jane Turner about scientific studies and statistics in authoritative treatises, journals and periodicals concerning the propensities of different types of persons to kill children because profile evidence is inadmissible on the issue of who is guilty in that said evidence is irrelevant to whether appellant committed the charged offense, it was prejudicial in that it would unduly distract the jury from what occurred in the case at bar, and such writings may not be used on cross-examination where, as here, they do not impeach, contradict or discredit the testimony of the experts in question.

Appellant alleges that the trial court abused its discretion in the guilt phase when it refused to allow her counsel to cross-examine Dr. Martin Keller and Dr. Jane Turner about scientific studies and statistics in authoritative treatises, journals and periodicals concerning the propensities of different types of persons to kill children (App.Br. 60-63). Appellant contends that her counsel should have been allowed to use this profile testimony as substantive evidence on the issue of her guilt (App.Br. 65-72).

A. Relevant facts

The record shows that Dr. Martin Keller, a doctor at Cardinal Glennon Hospital, testified about treating the victim, but did not testify about who committed the crime and did not offer any statistical analysis who was likely to have committed the crime (Tr. 173-188). Dr. Jane Turner, an Assistant Medical Examiner, testified about performing the autopsy on the

victim and the results of the autopsy, but did not testify about who committed the crime and did not offer any statistical analysis who was likely to have committed the crime (Tr. 193-220).

Prior to the trial, appellant had filed a motion in limine concerning the admissibility of profile testimony as substantive evidence (L.F. 164-166). In that motion, she alleged that when she deposed Dr. Turner, that doctor stated that based on her experience and review of certain studies published in authoritative treatises, journals and periodicals, she could say that:

> a. Children living in households with one or more male adults not related to them are at an increased risk for maltreatment, injury or death. Moreover, that these same children were subjected to abuse or even death as a result of shaking or blunt trauma.
>
> b. That scientific studies demonstrate that children living in households with adult men unrelated to them are eight (8) times more likely to die of abuse than children living with one or both biological parents.
>
> c. That most perpetrators of shaking and/or blunt trauma to children are unrelated males.
>
> d. That an [sic] risk for infant children being abused is where the child is living with a step-father or the mother's boyfriend.
>
> e. That scientific studies have established that a common accidental injury explanation/defense offered by perpetrators is that the baby was in some form of distress, choking or not breathing and the perpetrator mildly shook the

baby in a vain error to revive the baby.

(L.F. 164-165).

When appellant raised this issue before trial, she conceded that no cases from Missouri or any other state held that the evidence such as the evidence in question was admissible (Tr. 6). The trial court found that the evidence in question was inadmissible and used appellant's motion in limine as her offer of proof (Tr. 7). Appellant renewed her offer of proof during the trial, indicating that she wanted to question both expert witnesses about this matter, and it was rejected by the trial court (Tr. 191-192, 237-239). Appellant also raised the matter in her motion for a new trial and attached the relevant portion of Dr. Turner's deposition (L.F. 230-233).

B. Analysis

The trial court did not abuse its discretion when it refused to allow Dr. Turner and Dr. Kelly to be cross-examined with studies about the propensity of people other than appellant to commit offenses because that evidence was irrelevant to the issue of whether appellant committed the charged offense. It is widely recognized that statistics and profile testimony may not be used as substantive evidence on the issue of who is guilty of an offense. State v. Candela, 929 S.W.2d 852, 865-866 (Mo.App., E.D. 1996)(admission of evidence that the victim suffered from shaken infant syndrome was admissible because it was not evidence that the defendant was responsible for the death and did not address the credibility of the victim); Minnesota v. Nystrom, 596 N.W.2d 256, 260 (Minn.1999)(community crime statistics were inadmissible because they were not relevant to prove that the defendant acted in self-defense

when he shot the victim); Hudson v. Florida, 820 So.2d 1070 (Fla.5th DCA 2002)(use of pedofile profile testimony as substantive evidence on the issue of guilt is error); Johnson v. Delaware, 813 A.2d 161, 165-166 (Del.2001)(drug courier profile evidence is not admissible as substantive evidence on the issue of guilt); People v. Castaneda, 64 Cal.Rptr.2d 395, 398 (Cal.App.4th 1997)(admission of heroin dealer profile testimony as substantive evidence on the issue of guilt is error). Such evidence is dangerous because it distracts the jury from what occurred in the case at bar and focuses the attention of jurors on the conduct of others as to the issue of whether or not the defendant is guilty. Thus, its prejudicial nature outweighs its probative value.

While profile evidence on the issue of whether the defendant committed a charged act is inadmissible, profile evidence is admissible if it pertains to what types of actions could have caused injuries. State v. Candela, supra at 865-866 (victim suffered from shaken baby syndrome). It is also admissible to explain what types of behavioral characteristics are commonly observed in victims. State v. Silvey, 894 S.W.2d 662, 671 (Mo.banc 1993). This is because, for example, in cases of child sexual abuse the behavior of victims might appear unusual. State v. Williams, 858 S.W.2d 796, 799 (Mo.App., E.D. 1993).

The evidence in question is of the class that was found to be inadmissible in State v. Candela, supra at 865-866, because it pertains to whether appellant was the person who committed the offense, rather than to the nature of the victim's injuries or conduct.

Additionally, if the evidence in question had been admitted, it would have been improperly used to attack the credibility of Matthew Eckhoff, who was the State's eyewitness

to the abuse, by stating that it was more likely that he committed the offense than appellant. It is well-established that profile evidence may not be used if it comments on a witnesses' credibility or gives a "quantification of the probability" of a witnesses' credibility, as occurred in the case at bar. State v. Williams, supra at 800-801 (child-sex case reversed where expert testified that incidents of lying among children is very low, less than three percent).

Moreover, the studies in question could not be used as learned treatises during the cross-examination of the doctors because the doctors never testified about whether or not appellant committed the charged offense and they never offered profile evidence concerning whether she committed the offense. Learned treatises may be used for "impeaching, contradicting, or discrediting a witness through cross-examination," but cannot be used "as independent evidence of the opinions and theories advanced by the parties." Stang-Starr v. Byington, 532 N.W.2d 26, 109 (Neb. 1995); Coats v. Hickman, 11 S.W.3d 798, 803 (Mo.App., W.D. 1999). Appellant sought to use the materials in question as independent evidence to support her theory as to who committed the offense, not for the proper purpose of impeaching, contradicting, or discrediting the doctors. Thus, she could not have properly used the materials in question to question the doctors even if profile evidence as to who committed the offense was admissible.

In light of the above, respondent submits that the trial court did not abuse its discretion when it refused to allow Dr. Turner and Dr. Kelly to be cross-examined with studies about the propensity of people other than appellant to commit offenses. Accordingly, appellant's second point on appeal must fail.

III.

The trial court did not err when it denied appellant's motion to declare § 557.036 facially unconstitutional and proceeded with a bifurcated trial because that statute is constitutional, and appellant failed to prove that she was prejudiced by the trial court's actions.

In appellant's third point relied on, she alleges that the trial court committed prejudicial error when it denied her motion to declare § 557.036, RSMo Cum.Supp. 2003, facially unconstitutional and proceeded with a bifurcated trial because (A) § 557.036 does not require the jury to find evidence supporting punishment in the penalty phase beyond a reasonable doubt; (B) § 557.036 does not require the State to give notice to the defense of penalty-phase evidence or witnesses; (C) § 557.036 permits the introduction of character evidence even if the defendant has not injected her character into the case during the trial; and (D) the Missouri Legislature encroached on an area reserved for the judicial branch by passing this statute (App.Br. 73-74, 90-95; L.F. 157-160; Tr. 16).

A. Overview of § 557.036 and facts of this case

Before addressing appellant's claims, respondent will explain the statute in question and how it affected this case.

Section 557.036, as amended in 2003, changed procedures for trying a defendant by permitting the jury to have a more accurate and individualized picture of the defendant and the defendant's crime before it recommends a punishment. It does this by allowing jury trials to occur in two phases, instead of one phase. In the first phase, the jury determines the issue of

guilt. § 557.036.2, RSMo Cum.Supp. 2003. In the second phase, the jury considers the issue of punishment. § 557.036.3, RSMo Cum.Supp. 2003. In making this second determination, the jury is permitted to consider mitigating evidence and evidence that supports punishment. § 557.036.3, RSMo Cum.Supp. 2003.[1] The statute also provides that if the jury cannot agree on punishment, the trial court shall decide the sentence. §557.036.4(2), RSMo Cum.Supp. 2003.

In the guilt phase, the jury found that appellant was guilty as charged (L.F. 11). In the penalty phase, the State presented evidence through the testimony of four witnesses showing: that appellant had a tendency to leave the care of Zachary to others; that she gave deficient care to Zachary; that Zachary was well-loved and would be missed; that when appellant was told that Zachary would be retarded if he survived she said that she would "like to pull the plug"; and that she once hit two-year-old Noah Eckhoff in the face with such force that she stunned him and left a print on the side of his face (Tr. 896-934).

Appellant presented evidence that she had been sexually and physically abused by her parents when she was a child, and that she had been physically abused at a foster home (Tr. 946-975). She also presented evidence that she cares for people, did volunteer work in the past, that she loved Zachary, and that the couple who adopted her loved her (Tr. 978-979, 982-993).

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[1]Under the prior scheme, evidence supporting punishment and mitigating evidence could be presented to the judge at the sentencing hearing after the finding of guilt and any permissible recommendations as to punishment were made. See State v. Hatcher, 835 S.W.2d 340, 346 (Mo.App., W.D. 1992); Edwards v. State, 794 S.W.2d 249, 251 (Mo.App., W.D. 1990; Eichelberger v. State, No. 62785, slip op. at 4-7 (Mo.App., W.D. May 25, 2004).

After the close of the penalty-phase evidence, instructions, argument of counsel, and jury deliberations, the jury announced that it was unable to agree on a punishment (L.F. 12). The trial court later sentenced appellant to twenty years in the custody of the Department of Corrections (L.F. 1017).

B. Appellant cannot challenge constitutionality of statute, except as it was applied to her

Appellant alleges that § 557.036 is unconstitutional on its face in an attempt to avoid having to show that she was prejudiced by the application of that statue (App.Br. 75). However, "[i]t is a fundamental rule of constitutional adjudication that 'a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may be conceivably applied unconstitutionally to others.'" State v. Mahan, 971 S.W.2d 307, 311 (Mo.banc 1998), quoting Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The exceptions to this rule are where parties stand to lose by the outcome of a particular suit, but have no effective avenue of preserving their rights themselves, and when a defendant raises a claim under the First Amendment to the United States Constitution. State v. Mahan, supra at 311. Neither of these exceptions are involved in the case at bar. Thus, appellant's claims as to § 557.036 being facially unconstitutional are without merit.

C. Specific analysis of appellant's claims

1. Appellant's claim that § 557.036 does not require the jury to find evidence supporting punishment in the penalty phase beyond a reasonable doubt

Appellant's claim "A" is that § 557.036 is unconstitutional because it does not identify the standard for the jury to use in reviewing evidence in that it merely requires jurors to agree on the punishment that they assess (App.Br. 73). § 557.036.3 and 4.(2). Appellant argues that any fact that warrants a punishment other than the lowest available punishment within the range of punishment must be found beyond a reasonable doubt (App.Br. 95).

However, the United States Constitutional does not require a state to adopt specific standards for instructing the jury in consideration of evidence in support of punishment and mitigating evidence. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Additionally, there is no there is no right to a finding by a jury beyond a reasonable doubt that any particular facts exist and warrants a specific punishment within the unenhanced range of punishment for an offense because there is no constitutional right to jury sentencing. State v. Emery, 95 S.W.3d 98, 102 (Mo.banc 2003); Ring v. Arizona, 536 U.S. 584, 597 n. 4, 122 S.Ct. 2448, 153 L.Ed.2d 556 (2002).

Appellant argues that any fact that warrants a particular punishment within the range of punishment for an offense, other than the minium punishment, must be found beyond a reasonable doubt because of Apprendi v. New Jersey, 530 U.S. 584, 120 S.Ct. 2348, 153 L.Ed.2d 556 (2002), and Ring v. Arizona, supra (App.Br. 95). However, neither of these opinions stated that a jury is required to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense. Those cases merely held that matters that are the functional equivalent of elements of offenses, such as a statutory aggravating circumstance that is required for eligibility for the death penalty, must be found

beyond a reasonable doubt by a jury. Ring v. Arizona, supra 536 U.S. at 602; Apprendi v. New Jersey, supra 530 U.S. at 482-483; see also Blakely v. Washington, 124 U.S. 2531, 2536 (2004). The finding of facts and the weighing of facts in deciding what sentence to recommend within an unenhanced range of punishment for an offense are not matters that must be found beyond a reasonable doubt because they are not the functional equivalent of the finding of an element of an offense. See State v. Glass, No. 85128, slip op. at 38-39 (Mo.banc June 8, 2004)(finding in a death-penalty case as to whether the aggravating circumstances outweighed the mitigating circumstances was not required to be found beyond a reasonable doubt); State v. Deck, No. 85443, slip op. at 4-5 (Mo.banc May 25, 2004)(same); People v. Danks, 82 P.3d 1249 (Cal. 2004)(same). Thus, appellant's claim is without merit.

2. Claim that § 557.036 does not require the State to give notice to the defense of penalty-phase evidence or witnesses

Appellant's claim "B" is that § 557.036 is unconstitutional because it does not require the State to give notice to the defense of penalty-phase evidence or witnesses (App.Br. 73). She claims that this denied her right to due process (App.Br. 102-103).

However, there is no general constitutional right to discovery in a criminal case, Gray v. Netherland, 518 U.S. 152, 168, 116 S.Ct. 2064, 135 L.Ed.2d 437 (1996); State v. Garner, 799 S.W.2d 950, 957 (Mo.App., S.D. 1990), and "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). It merely requires that defendants cannot be compelled to give disclosure if they are not given reciprocal discovery rights, Id.

412 U.S. at 476, and that the State is required to disclose, upon request, evidence that is favorable to an accused. Gray v. Netherland, supra 518 U.S. at 168; Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1976).

Appellant's claim that § 557.036 is unconstitutional because it does not require the State to give notice to the defense of penalty-phase evidence or witnesses is without merit because the Due Process Clause does not require the State to provide appellant with such information.

Additionally, § 557.036 is not unconstitutional because this Court has the power to adopt rules permitting discovery and it has adopted rules that permit the discovery of penalty phase-evidence and witnesses. For example Rule 25.03(A)(1) requires the State to provide the names and last known addresses of persons who the State intends to call at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements. Rule 25.04 allows the trial court to grant reasonable requests from the defense for the State to disclose any information or material that is not covered by Rule 25.03. Appellant also had the ability to depose witnesses who were disclosed to learn the nature of their testimony, pursuant to Rule 25.12.

Moreover, even if § 557.036 was unconstitutional as to others, appellant failed to prove that it was unconstitutionally applied to her because she was not prejudiced by the trial court's actions. There is no evidence that appellant suffered genuine surprise, see State v. Farr, 69 S.W.3d 517, 523 (Mo.App., S.D. 2001), and that this surprise prevented "meaningful efforts to consider and prepare a strategy for addressing the evidence." State v. Taylor, 134 S.W.3d

21, 27 (Mo.banc 2004). The State's four penalty-phase witnesses were listed as witnesses in the indictment, which was filed about a year and a half before appellant's trial began (L.F. 24). Appellant's counsel did not appear to be surprised by their testimony, and there is no evidence that earlier disclosure of the State's evidence and a different disclosure of the State's witnesses would have caused appellant's counsel to have handled the case differently and that this would have changed the outcome of the case. State v. Carlisle, 995 S.W.2d 518, 521 (Mo.App., E.D. 1999); State v. Kilgore, 771 S.W.2d 57, 66 (Mo.banc 1989), cert. denied 493 U.S. 874 (1989); State v. Johnston, 957 S.W.2d 734, 750 (Mo.banc 1997), cert. denied 522 U.S. 1150 (1998); State v. Toler, 889 S.W.2d 158, 161 (Mo.App., S.D. 1994). Thus, appellant's claims pertaining to notice of evidence and witnesses are without merit.

3. Admission of character evidence

Appellant's claim "C" is that § 557.036 is unconstitutional because it permits the introduction of character evidence even if the defendant has not injected her character into the case during the trial (App.Br. 73).

Section 557.036.3. provides that character evidence is admissible. It provides, in relevant part:

> Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant.

This statute informs the parties of the types of evidence that is admissible and

recognizes that a defendant's character is a central issue in the penalty phase of a trial, regardless of whether the defendant presents any evidence. Its language is similar to § 565.030.4, RSMo 2000, which describes the testimony that is admissible in death-penalty cases.

It is well-established that the purpose of having a separate penalty phase is to permit the presentation of a broad range of evidence that is relevant to punishment, but irrelevant or inflammatory as to guilt. State v. Ervin, 979 S.W.2d 149, 158 (Mo.banc 1998). Both the State and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment. Id.; State v. Whitfield, 5 S.W.3d 505, 515 (Mo.banc 1999). "[E]vidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial." Id. The argument that the State may not introduce, in the penalty phase, evidence of unadjudicated bad acts, "has been repeatedly rejected" by the Missouri Supreme Court. State v. Ferguson, 20 S.W.3d 484, 500 (Mo.banc 2000), cert. denied 531 U.S. 1019 (2000).

Appellant relies on State v. Debler, 856 S.W.2d 641, 656-657 (Mo.banc 1993), a death-penalty case which dealt with the State's failure to disclose at the instructions conference before the penalty phase its intent to specifically instruct the jury on and submit certain nonstatutory aggravating circumstances (App.Br. 104). Appellant erroneously claims that the Missouri Supreme Court in Debler "held that extensive admission during the penalty phase of uncharged conduct, when the conduct is not found beyond a reasonable doubt resulted in plain error and manifest injustice" (App.Br. 104). However, the Missouri Supreme Court has

rejected her interpretation of Debler. In State v. Glass, No. 85128, slip op. at 38-39 (Mo.banc June 8, 2004), it stated:

> This Court has repeatedly rejected the claim that the admission in the penalty phase of unadjudicated bad acts violates due process because the state is not required to prove those acts beyond a reasonable doubt. See State v. Ferguson, 20 S.W.3d 485, 500 (Mo.banc 2000); State v. Kinder, 942 S.W.2d 313, 331 (Mo.banc 1996). "The trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment." State v. Six, 805 S.W.2d 159, 166 (Mo.[banc] 1991).
>
> Glass's reliance on Debler is misplaced. This Court has consistently noted that the error in Debler was lack of notice. There is no merit to the claim that Debler required the jury to be instructed on what weight to give evidence of unadjudicated criminal acts. State v. Christeson, 50 S.W.3d 251, 269-270 (Mo.banc 2001); State v. Ervin, 979 S.W.2d 149, 158 (Mo.banc 1998).

Moreover, appellant has failed to prove that she was prejudiced by the trial court's actions because, as was discussed in the previous subsection, there is no evidence that she was not aware of the evidence that the State was going to submit to the jury. Thus, appellant's claim concerning evidence of her character being admitted into the case is without merit.

D. Separation of powers claim

Appellant's claim "D" is that § 557.036 is unconstitutional because the legislature violated the separation of powers doctrine when it enacted this law (App.Br. 73). Appellant

correctly argues that § 557.036 is a procedural change in the law (App.Br. 107). She then incorrectly argues that the legislature could not make this procedural change because this Court had already issued rules pertaining to trials that did not address this issue of "second stage proceedings," other than in death-penalty cases (App.Br. 107-108).

However, the fact that this Court did not address the issue in its rules is fatal to appellant's claim. It is well-established that although Article V, § 5 of the Missouri Constitution gives this Court power to establish procedural rules, it "does not divest the legislature of similar power." State ex rel. Heilman v. Clark, 857 S.W.2d 399, 401 (Mo.App., W.D. 1993). "Where the legislature has enacted a statute pertaining to a procedural matter which is not addressed by or inconsistent with any supreme court rule, the statute may be enforced." State ex rel. Kinsky v. Pratte, 994 S.W.2d 74, 76 (Mo.App., E.D. 1999). While this Court has established numerous rules pertaining to the procedures to be used in criminal cases, See Rules 27.01-27.09, none of those rule address whether or not a two-phase trial is permitted in a nondeath-penalty case, and § 557.036 is not inconsistent with any of those rules. Thus, the legislature had authority to enact § 557.036, that statute may be enforced, appellant's claim is without merit, and her third point on appeal must fail.

IV.

The trial court did not err by overruling appellant's objection to § 557.036 being applied retroactively to this case because § 557.036 is a procedural statute that is required by §1.160 to be applied retroactively.

While the parties agree that § 557.036, RSMo Cum.Supp. 2003, is a procedural law that must be applied retroactively to this case, appellant argues that if this Court finds that the law is a substantive law, the trial court erred by applying it to this case because of § 1.160, RSMo 2000 (App.Br. 107, 113; L.F. 157-158; Tr. 16).[2]

§ 1,160 states, in relevant part:

> "No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but that the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:
>
> (1) That all such proceedings ***shall be conducted according to existing procedural laws***; ...

(emphasis added).

This Court has defined procedural law as follows:

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[2]Retroactive application occurred in this case because appellant's crime occurred before § 557.036 was enacted.

> Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit.

Wilkes v. Missouri Highway and Transportation Commission, 762 S.W.2d 27, 28 (Mo.banc 1988); State ex rel. Kinsky v. Pratte, 994 S.W.2d 74, 76 (Mo.App., E.D. 1999).

Section 557.036 is a procedural law because it is simply the machinery for carrying on a suit. Section 1.160 requires that procedural laws be applied retroactively. Additionally, this Court's order, dated June 27, 2003, about revisions to the MAI-CR 3d, made it clear that the new penalty-phase instructions were to be effective on that date, which was before appellant's trial. Thus, the trial court did not err by applying § 557.036 retroactively, and appellant's fourth point on appeal must fail.

V.

The trial court did not err in the penalty phase when it refused to submit appellant's non-MAI Instruction "A" which required the jury, among other things, to "find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the custody of the Department of Corrections" because that instruction did not accurately state the law.

Appellant alleges that the trial court erred when it refused to submit his non-MAI Instruction "A," which required the jury, among other things, to "find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the custody of the Department of Corrections" (L.F. 200; Tr. 884; App.Br. 118).

In the penalty phase, the trial court submitted to the jury instructions that complied with the new pattern penalty-phase nondeath-penalty instructions that have been approved by this Court, i.e., MAI-CR 3d 305.01, MAI-CR 3d 305.02, MAI-CR 3d 305.03, MAI-CR 3d 305.04, and MAI-CR 3d 305.07 (L.F. 172-176). These instructions required the jurors to unanimously agree on any punishment that they assessed (Tr. 174).

Appellant's Instruction "A," which was refused by the trial court, reads as follows:

INSTRUCTION NO. A

You must unanimously find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the Department of Corrections. If such juror finds facts and circumstances in aggravation of punishment that are sufficient to increase

defendant's sentence from the ten (10) years, then you may assess a sentence not to exceed thirty (30) years or life imprisonment.

You must also determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

If you do not unanimously find beyond a reasonable doubt from the evidence that the facts and circumstances in aggravation of punishment warrant an increase from the ten (10) year sentence of punishment, or if you believe that the facts or circumstances in mitigation sufficiently outweigh the facts and circumstances in aggravation of punishment, you must return a verdict fixing defendant's punishment at ten (10) in the Department of Corrections.

(L.F. 200).

The trial court did not err by refusing to give appellant's non-MAI instruction because that instruction did not accurately state the law, and the decision of a trial court not to submit an incorrect instruction cannot be error. State v. Parkhurst, 845 S.W.2d 31, 36-37 (Mo.banc 1992).

Appellant's instruction is erroneous because it requires the finding of "aggravating circumstances" to impose a sentence of greater than the minimum punishment, which is ten years, and creates a presumption that the minimum sentence for an offense is appropriate (L.F.

200). In cases that do not involve the death penalty, no statute requires the finding of "aggravating circumstances," or even a finding of a single aggravating circumstance, in order to submit a punishment of greater than the minimum punishment, and no statute creates a presumption that the minimum punishment for an offense is appropriate.

Appellant's proposed instruction is also erroneous because it requires a finding of the "aggravating circumstances" that warrant a punishment of over ten years by proof beyond a reasonable doubt (L.F. 200). As appellant admits in Point III of his brief, § 557.036, RSMo Cum. Supp. 2003, does not state that such a finding must be made by proof beyond a reasonable doubt (App.Br. 73, 100). Section 557.036 merely required the jurors to agree on the punishment that they assess. § 557.036.3 and 4.(2).

Appellant does not appear to dispute that instructions that were given accurately instructed the jury on the applicable law. Her real issue is, as was argued in Point III of her brief, that the applicable law is unconstitutional because it does not require proof beyond a reasonable doubt that aggravating circumstances exist in order to impose punishment in excess of the minimum punishment (App.Br. 119-121).

However, as was discussed in Point III, subsection C.1, of this brief, the United States Constitutional does not require a state to adopt specific standards for instructing the jury in consideration of evidence in support of punishment and mitigating evidence. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Additionally, there is no right to a finding by a jury beyond a reasonable doubt that any particular fact exists and warrants a specific punishment within the unenhanced range of punishment for an offense because there

is no constitutional right to jury sentencing. State v. Emery, 95 S.W.3d 98, 102 (Mo.banc 2003); Ring v. Arizona, 536 U.S. 584, 597 n. 4, 122 S.Ct. 2448, 153 L.Ed.2d 556 (2002).

Appellant argues that any fact that warrants a punishment within the range of punishment for an offense, other than the minium punishment, must be found beyond a reasonable doubt because of Apprendi v. New Jersey, 530 U.S. 584, 120 S.Ct. 2348, 153 L.Ed.2d 556 (2002), and Ring v. Arizona, supra (App.Br. 95). However, neither of these opinions stated that a jury is required to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense. Those cases merely held that matters that are the functional equivalent of elements of offenses, such as a statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt by a jury. Ring v. Arizona, supra 536 U.S. at 602; Apprendi v. New Jersey, supra 530 U.S. at 482-483. The finding of facts and the weighing of facts in deciding what sentence to recommend within an unenhanced range of punishment for an offense are not matters that must be found beyond a reasonable doubt because they are not the functional equivalent of the finding of an element of an offense. See State v. Glass, No. 85128, slip op. at 38-39 (Mo.banc June 8, 2004)(finding in a death-penalty case as to whether the aggravating circumstances outweighed the mitigating circumstances was not required to be found beyond a reasonable doubt); State v. Deck, No. 85443, slip op. at 4-5 (Mo.banc May 25, 2004)(same); People v. Danks, 82 P.3d 1249 (Cal. 2004)(same).

In light of the above, respondent submits that the trial court did not err when it refused

to submit Instruction "A" to the jury, and appellant's fifth point on appeal must fail.[3]

[3]Appellant argues that the remedy for the alleged instructional error is to reduce his sentence to ten years in the custody of the Department of Corrections (App.Br. 124). However, if prejudicial instructional error occurred, the remedy would be to remand the case to the trial court for a new penalty phase. State v. Ferguson, 887 S.W.2d 585 (Mo.banc 1994).

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 10,008 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 2nd day of August, 2004, to:

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APPENDIX